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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/673,296

09/29/2003

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P03115

3208

23702 7590 05/29/2008

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EXAMINER

BERTHEAUD, PETER JOHN

ART UNIT

PAPER NUMBER

3746

MAIL DATE

DELIVERY MODE

05/29/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MICHAEL MITTELSTEIN, JOHN T. SORENSEN,  
SOHEILA MIRHASHEMI,  
JAMES GERG and ROBERT SCHAUER

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Appeal 2008-0388  
Application 10/673,296  
Technology Center 3700

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Decided: May 29, 2008

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Before WILLIAM F. PATE III, LINDA E. HORNER, and  
STEPHEN D.A. MCCARTHY, *Administrative Patent Judges*.

WILLIAM F. PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

This is an appeal from the final rejection of claims 1-4. These are all the claims remaining in the application.

We have jurisdiction over the appeal pursuant to 35 U.S.C. §§ 134 and 6.

The claimed invention is directed to a peristaltic pump for ophthalmic surgery. As is well known in the art, such a pump has a deformable flexible tube interposed between a rigid backing plate and a rotary pump head. In Appellants' invention, the pump head is operable to translate toward and away from the backing plate to allow for installation of the tube and to release the vacuum in the tube when the aspiration handle tube is obstructed by tissue or the like.

Claims 2 and 3 reproduced below are further illustrative of the claimed subject matter.

2. A peristaltic pump for use in ophthalmic surgery comprising:

a housing;

a pump head having a plurality of rollers held within the housing;

a backing plate attached to the housing and for cooperation with the pump head; and

wherein the pump head moves relative to the housing and towards and away from the backing plate.

3. A peristaltic pump for use in ophthalmic surgery comprising:

a housing;

a pump head having a plurality of rollers extending from the housing;

a backing plate attached to the housing and for cooperation with the pump head; and

wherein the pump head moves relative to the housing and backing plate from an open position to an operative position for insertion of resilient surgical tubing between the rollers and the backing plate for peristaltically pumping aspirant through the tubing from a patient's eye during surgery.

#### REFERENCE

The reference of record relied upon by the examiner as evidence of lack of novelty is:

Steppe	US 4,713,051	Dec. 15, 1987
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#### REJECTION

Claims 1-4 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Steppe.

#### FINDINGS OF FACT

Steppe discloses a peristaltic pump for use in ophthalmic surgery comprising a housing 23 having an aspiration pump 81 which carries for rotation a roller assembly 82. In Steppe, the backing plate member is provided by the female aspiration boss 41 which forms the back surface of the aspiration pump opening 32 in cassette 20. See column 9, lines 3 thru 18. The movement of the cassette 20 of Steppe into the slot 26 is described in column 8 starting at line 47. As the description makes clear, as the cassette 20 is moved into the slot 26, springs 78 and 79 are compressed and the entire solenoid/pump mounting plate 76 moves rearwardly allowing the

latch arms 94 to enter the rectangular latch openings 46. Thus, it can be seen that as the cassette is inserted, the solenoid/pump mounting plate 76 is moved rearwardly by the cassette with the cassette containing the backing plate female aspiration boss 41. See column 8, line 63 through column 9, line 2.

Steppe discloses a cassette 20 placed in a slot 26. There is no structure disclosed therein that can be regarded as a drawer.

### PRINCIPLES OF LAW

The prior art may anticipate a claimed invention, and thereby render it non-novel, either expressly or inherently. *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349 (Fed. Cir. 2002). Express anticipation occurs when the prior art expressly discloses each limitation (i.e., each element) of a claim. *Id.* In addition, “[i]t is well settled that a prior art reference may anticipate when the claim limitations not expressly found in that reference are nonetheless inherent in it.” *Id.*

### ANALYSIS

As our Findings of Fact make clear, as the cassette 20 with the backing plate, i.e., female aspiration boss 41, is inserted into the housing, the entire mounting plate which contains the pump roller is moved rearwardly against mounting springs 78 and 79. Accordingly, it is our finding that the pump head of Steppe is movable with respect to the backing plate, but the pump head never translates *toward* the backing plate as the cassette is inserted. In other words, even though the cassette, when inserted, cooperates with the pump head to narrow the distance between the backing plate female

aspiration boss 41 and the pump roller 82 so as to impinge on the pump tube 62 therebetween, the pump head is translated rearwardly. When the pump head reaches the limit of its travel, the cassette continues inwardly to narrow the distance between the backing plate and the roller with the tube 62 therebetween. Independent claim 1 requires the pump head to move from an open position to an operative position by having the pump head translate *toward* the backing plate. Thus claim 1 is not anticipated by Steppe.

Independent claims 2 and 3 merely require the pump head to move toward and away from the backing plate or relative to the backing plate, respectively. It is our finding that when the cassette of Steppe is removed from the housing, springs 78 and 79 bias pump head 82 toward the slot opening. This movement of the pump head is *toward* the backing plate. Thus the limitations of claims 2 and 3 are satisfied, and these claims lack novelty over Steppe.

Finally, notwithstanding the Examiner's argument that the housing 28 and edge 36 of the cassette 20 of Steppe can be considered a drawer, we have found that Steppe does not disclose a "drawer" as that term is generally understood. The subject matter of claim 4 does not lack novelty over the Steppe patent.

With respect to claim 1, we acknowledge the Examiner's argument that as the cassette is inserted, the *relative motion* of the pump head is toward the backing plate. See Examiner's Answer page 5, lines 7 thru 13. However, in our view, the claim does not specify relative motion but affirmatively requires the pump head to translate toward the backing plate.

Since the pump head of Steppe only moves rearwardly or away from the backing plate on insertion, it does not satisfy this claim limitation.

CONCLUSION

The rejection of claims 1 and 4 under 35 U.S.C. § 102 is reversed.

The rejection of claims 2 and 3 under 35 U.S.C. § 102 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

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